Supreme Court, U.S.
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No. 09-30

IN THE
Supreme Court of the United States

BLAKE H. MOORE, M.D., *et al.*,

Petitioners,

v.

WILLIAMSBURG REGIONAL HOSPITAL; JOHN HALES; *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL APPENDIX

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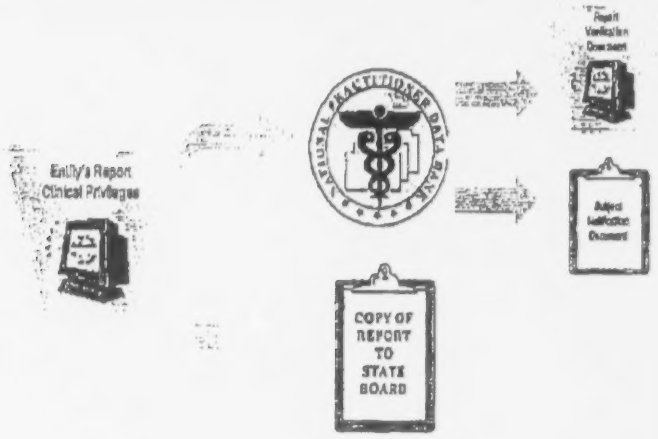
REPORTING ADVERSE CLINICAL PRIVILEGES ACTIONS



Reporting Adverse Clinical Privileges Actions

Health care entities must report adverse actions within 15 days from the date the adverse action was taken or clinical privileges were voluntarily surrendered. **The health care entity must print a copy of each report submitted to the NPDB and mail it to the appropriate State licensing board for its use.** The *Report Verification Document* that health care entities receive after a report is successfully processed by the NPDB should be used for submission to the appropriate State licensing board.

Reportable adverse clinical privileges actions are **based on a physician's or dentist's professional competence or professional conduct that adversely affects, or could adversely affect, the health or welfare of a patient.** Hospitals and other eligible health care entities must report:

- Professional review actions that adversely affect a physician's or dentist's clinical privileges for a period of more than 30 days.
- Acceptance of a physician's or dentist's surrender or restriction of clinical privileges while under investigation for possible professional incompetence or improper professional conduct or in return for not conducting an investigation or reportable professional review action.

Adverse actions taken against a physician's or dentist's clinical privileges include reducing, restricting, suspending, revoking, or denying privileges, and also include a health care entity's decision not to renew a physician's or dentist's privileges if that decision was based on the practitioner's professional competence or professional conduct. **Health care entities may report such actions taken against the clinical privileges of other health care practitioners.**

Adverse actions involving censures, reprimands, or admonishments should not be reported to the NPDB. Matters not related to the professional competence or professional conduct of a practitioner should not be reported to the NPDB. For example, adverse actions based primarily on a practitioner's advertising practices, fee structure, salary arrangement, affiliation with other associations or health care professionals, or other competitive acts intended to solicit or retain business are excluded from NPDB reporting requirements.

See Table E-3 on page E-21 for more information on determining reportable actions for clinical privileges.

Hospitals and other health care entities must report revisions to previously reported adverse actions. For more information on revisions, see page E-5, Revision to Action, in the Types of Reports section.

Multiple Adverse Actions

If a single professional review action produces multiple clinical privileges actions (for example, a 12-month suspension followed by a 5-month probation), only one report should be submitted to the NPDB. The Adverse Action Classification Code for the principal action should be submitted on the AAR, and the narrative description should describe the additional adverse actions imposed.

A Revision to Action must be submitted when each of the multiple actions is lifted. (Following the previous example, a revision must be submitted when clinical privileges are reinstated with probation after the suspension, and another revision must be submitted when the probationary period ends.)

If an adverse action against the clinical privileges of a practitioner is based on multiple grounds, only a single report must be submitted to the NPDB. However, all reasons for the action should be reported and explained in the narrative. The reporting entity may select up to four Basis for Action codes to indicate these multiple reasons. Additional reasons should be summarized in the narrative description.

Denial of Applications

A restriction or denial of clinical privileges that occurs solely because a practitioner does not meet a health care institution's established threshold eligibility criteria for that particular privilege is not reportable to the NPDB.

Such restrictions or denials are not deemed the result of a professional review action relating to the practitioner's professional competence or professional conduct, but are considered decisions based on eligibility.

For example, if an institution retroactively changes the eligibility criteria for a particular clinical privilege, a physician that does not meet the new criteria will lose previously granted clinical privileges; this loss of privileges is not reportable to the NPDB.

Adverse clinical privileges actions reportable to the NPDB result from professional review actions relating to the practitioner's professional competence or professional conduct.

Withdrawal of Applications

Voluntary withdrawal of an initial application for medical staff appointment or clinical privileges prior to a final professional review action generally is not reportable to the NPDB. However, if a practitioner applies for renewal of medical staff appointment or clinical privileges and voluntarily withdraws that application while under investigation by the health care entity for possible professional incompetence or improper professional conduct, or in return for not conducting such an investigation or taking a professional review action, then the withdrawal of application for clinical privileges is reportable to the NPDB.

Investigations

Investigations should not be reported to the NPDB; only the **surrender or restriction of clinical privileges** while under investigation or to avoid investigation is reportable. This would include a failure to renew clinical privileges while under investigation.

A health care entity that submits an AAR based on surrender or restriction of a physician's or dentist's privileges while under investigation should have contemporaneous evidence of an ongoing investigation at the time of surrender, or evidence of a plea bargain. The reporting entity should be able to produce evidence that an investigation was initiated prior to the surrender of clinical privileges by a practitioner. Examples of acceptable evidence may include minutes or excerpts from committee meetings, orders from hospital officials directing an investigation, and notices to practitioners of an investigation.

Guidelines for Investigations

- An investigation must be carried out by the health care entity, not an individual on the staff.
- The investigation must be focused on the practitioner in question.
- The investigation must concern the professional competence and/or professional conduct of the practitioner in question.
- A routine or general review of cases is not an investigation.
- A routine review of a particular practitioner is not an investigation.
- An investigation should be the precursor to a professional review action.
- An investigation is considered ongoing until the health care entity's decision making authority takes a final action or formally closes the investigation.

Summary Suspension

A summary suspension is reportable if it is:

- In effect or imposed for more than 30 days.
- Based on the professional competence or professional conduct of the physician, dentist, or other health care practitioner that adversely affects, or could adversely affect, the health or welfare of a patient.
- The result of a professional review action taken by a hospital or other health care entity.

A summary suspension is often imposed by an individual, for instance, the chairman of a department. Commonly,

this action is then reviewed and confirmed by a hospital committee, such as a medical executive committee, as authorized by the medical staff bylaws. The suspension would then be viewed as a professional review action taken by the entity.

If the suspension is modified or revised as part of a final decision by the governing board or similar body, the health care entity must then submit a Revision to Action of the Initial report made to the NPDB.

If the physician, dentist, or other health care practitioner surrenders his or her clinical privileges during a summary suspension, that action must be reported to the NPDB. The action is reportable because the practitioner is surrendering the privileges either while under investigation concerning professional conduct or professional competence that did or could affect the health or welfare of a patient or in order to avoid a professional review action concerning the same.

Summary suspensions are considered to be final when they become professional review actions through action of the authorized hospital committee or body, according to the hospital bylaws.

The basis for this interpretation is that, pursuant to Part A of the *Health Care Quality Improvement Act* (42 U.S.C. §11112)(c)(2), a summary suspension is taken to prevent "imminent danger to the health of any individual."

The Act itself treats summary suspensions differently than other professional review actions: the procedural rights of the practitioner are provided for following the suspension, rather than preceding it. This reporting policy for summary suspensions is in keeping with the purpose of the Act, which is to protect the public from the threat of incompetent practitioners continuing to practice without disclosure or discovery of previous damaging or incompetent performance.

In establishing this policy on the reporting of summary suspensions, HHS assumes that hospitals use summary suspensions for the purpose stated in Part A of the Act: to protect patients from imminent danger, rather than for reasons that warrant routine professional review actions. HHS also emphasizes that this policy on summary suspension is solely for the purpose of reporting to the NPDB, and does not relate to the criteria for immunity under Part A of the Act.

Table E-3. Determining Reportable Actions for Clinical Privileges

Action	Reportable
Based on assessment of professional competence, a proctor is assigned to a physician or dentist for a period of more than 30 days. The practitioner must be granted approval before certain medical care is administered.	Yes
Based on assessment of professional competence, a proctor is assigned to supervise a physician or dentist, but the proctor does not grant approval before medical care is provided by the practitioner.	No
As a matter of routine hospital policy, a proctor is assigned to a physician or dentist recently granted clinical privileges.	No
A physician or dentist voluntarily restricts or surrenders clinical privileges for personal reasons; professional competence or professional conduct is not under investigation.	No
A physician or dentist voluntarily restricts or surrenders clinical privileges; professional competence or professional conduct is under investigation.	Yes
A physician or dentist voluntarily restricts or surrenders clinical privileges in return for not conducting an investigation of professional competence or professional conduct.	Yes
A physician's or dentist's application for medical staff appointment is denied based on professional competence or professional conduct.	Yes
A physician or dentist is denied medical staff appointment or clinical privileges because the health care entity has too many specialists in the practitioner's discipline.	No
A physician's or dentist's clinical privileges are suspended for administrative reasons not related to professional competence or professional conduct.	No
A physician's or dentist's request for clinical privileges is denied or restricted based upon assessment of clinical competence as defined by the hospital.	Yes

Examples of Reportable and Non-Reportable Actions

Example 1: A physician member of a hospital medical staff wishes to perform several clinical tests and procedures, but does not have the appropriate clinical privileges. The physician applies for an expansion of clinical privileges. The physician's Department Head and the Medical Staff Credentials Committee find that, based on their assessment of the physician's demonstrated professional performance, the physician does not have the clinical competence to perform the additional tests and procedures, and they recommend denial of the request for expanded clinical privileges. The hospital's governing body reviews the case, affirms the findings and recommendations, and denies the physician's request for expanded clinical privileges for reasons relating to professional competence.

The action is reportable because the denial of privileges adversely affects the clinical privileges of the physician for longer than 30 days.

Whether particular actions are reportable to the NPDB is often best determined by examining a hospital's medical staff bylaws, rules, and regulations with regard to provisions defining who is empowered to take a professional review action, what constitutes a professional review action that adversely affects the clinical privileges of a practitioner, and how that action relates to professional competence or professional conduct.